

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DANIELLE HILLING,

Petitioner,

v.

Civil Action No. 5:08CV152
(STAMP)

STATE OF WEST VIRGINIA,

Respondent.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Background

The pro se¹ petitioner, Danielle Hilling, filed a brief and petition for appeal of criminal conviction and sentence which this Court construed as a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2254. The motion was referred to United States Magistrate Judge John S. Kaull for a report and recommendation pursuant to Local Rule of Prisoner Litigation Procedure 83.09. Thereafter, the petitioner filed a motion to proceed as pauper, but did not file any supplements or amendments to her original brief and petition for appeal. On January 5, 2009, however, the petitioner filed a motion to withdraw her § 2254 petition. Following review of the motions, Magistrate Judge Kaull submitted a report and recommendation recommending that the petitioner's motion to withdraw be granted, that this civil action

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1237 (7th ed. 1999).

be dismissed without prejudice, and that the petitioner's motion for leave to proceed in forma pauperis be consequently denied as moot. The magistrate judge advised the parties that, pursuant to 28 U.S.C. § 636(b)(1)(C), any party may file written objections to his proposed findings and recommendation within ten days after being served with a copy of the magistrate judge's recommendation. Neither party has filed objections. For the reasons set forth below, this Court finds that the report and recommendation of the magistrate judge should be affirmed and adopted in its entirety.

II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to those portions of a recommendation to which no objection is made, a magistrate judge's findings and recommendation will be upheld unless they are "clearly erroneous." See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Because the parties did not file objections, this Court reviews the report and recommendation for clear error.

III. Discussion

In her motion to withdraw, the petitioner claims that she seeks to withdraw her "appeal" both because it was filed without consulting a lawyer, and because she recently became aware that she must first exhaust state remedies. The magistrate judge found that the petitioner intended to proceed in this Court under § 2254 and

that she understood that certain procedural requirements must first be met. Accordingly, the magistrate judge recommended that the petitioner's motion to withdraw be granted, and that this case be dismissed without prejudice. Furthermore, the magistrate judge recommended that in light of his recommendation to grant the petitioner's motion and dismiss the case from the active docket of this Court, that the petitioner's motion for leave to proceed in forma pauperis should also be denied as moot. This Court finds no clear error in the magistrate judge's report and recommendation.

IV. Conclusion

Because this Court concludes that the magistrate judge's recommendation is without clear error, this Court hereby AFFIRMS and ADOPTS the magistrate judge's report and recommendation in its entirety. Accordingly, the plaintiff's motion to withdraw her § 2254 petition is GRANTED and DISMISSED WITHOUT PREJUDICE. Furthermore, the petitioner's motion for leave to proceed in forma pauperis is DENIED AS MOOT. It is ORDERED that this civil action be DISMISSED and STRICKEN from the active docket of this Court.

Finally, this Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action will result in a waiver of appellate rights. Thus, the petitioner's failure to object to the magistrate judge's proposed findings and recommendation bars the petitioner from appealing the judgment of

this Court. See 18 U.S.C. § 636(b)(1); Wright v. Collins, 766 F.2d 841, 845 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this memorandum opinion and order to the pro se petitioner by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is directed to enter judgment on this matter.

DATED: February 9, 2009

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE